IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 10, 2009 Session

DONALD EARL COVILL v. TAYLOR RENEE COVILL

Appeal from the Circuit Court for Hamilton County
No. 06D2119 W. Jeffrey Hollingsworth, Judge

No. E2008-00557-COA-R3-CV - FILED JUNE 30, 2009

In this divorce case, the trial court dissolved the parties' marriage, established a parenting plan under which Donald Earl Covill ("Father") was designated as the primary residential parent of the parties' two children, and divided the marital estate. Taylor Renee Covill ("Mother") appeals. She questions the propriety of the parenting plan and challenges the trial court's determination that real property in Georgia belongs to Father's mother. As a part of her argument with respect to the property in Georgia, Mother contends that a "confidential relationship" existed between the parties, which was violated by Father when he failed to advise her of his purchase of this property. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and J. STEVEN STAFFORD, J., joined.

Whitney Durand, Chattanooga, Tennessee, for the appellant, Taylor Renee Covill.

Jennifer H. Lawrence, Chattanooga, Tennessee, for the appellee, Donald Earl Covill.

OPINION

I.

The parties were married in October 1994. Two children were born to their union, Lauren Michelle Covill in December 1995, and Mary Madison Covill in November 1998 (collectively "the children"). For ease of reference, we will refer to the children as the parties did, *i.e.*, "Lauren" and "Madison." At the time of trial, Lauren was twelve and Madison was nine.

Father was a general contractor who did business under the trade name of Covill Construction Company. He was mainly involved in residential framing work. Mother worked as a nurse manager at Adventa Hospice in Chattanooga; she had previously been employed by Cigna.

Both of the children had attended a private Christian academy since kindergarten. Both were above-average students.

Mother sought to establish that property in Georgia purchased by Father in 2004 and upon which a house was later constructed was part of the marital estate. Mother was not aware of this purchase prior to the divorce proceedings. Ultimately the trial court ruled that the Georgia property belonged to Father's mother.[1]

According to Mother, the parties' eldest daughter, Lauren, began having behavior problems in 2002 when she was seven years old. Lauren called Mother names and tried to hit her. Mother said Father was reluctant to discipline Lauren for incidents he did not witness. Believing Lauren needed immediate help with her continuing emotional outbursts, Mother took her to a behavior therapist in September 2004. Mother acknowledged that she and Lauren did not have a good relationship in this time frame.

Mother proposed a parenting plan by the terms of which she and Father would alternate primary custody of the children. Mother felt that an increase in her parenting time would allow her relationship with the children to improve; she attributed their bad relationship in the past to the stress on her from living in the marital home. Mother felt that the children's approaching adolescence was a critical time for the girls to be with her and that, as they grew older, the children should have more say in the time spent with each parent. She said she had been the more active parent with respect to the children's education and other activities although, according to Mother, her involvement had declined since the parties' separation simply because she was not always informed of their activities. Since the separation, Father had remained in the marital home with the children while Mother rented an apartment. She spent weekends with the children. Mother wanted a close relationship with the children, but appreciated the fact that they loved their father.

Mother said she was surprised at the comment of Dr. William M. Hillner, a psychologist, in his independent custodial evaluation that the "relationship between these children and their mother greatly concern[ed]" him. Father said he would abide by all of Dr. Hillner's recommendations. Father wanted to be the primary residential parent and requested that the court adopt the parenting arrangement the parties had been following since Mother left the marital home in May 2007.

At the conclusion of trial, the court divorced the parties. In a separate memorandum opinion and order, the court established a parenting plan and divided the marital estate. In addition to naming Father as the primary residential parent, the plan provides for Mother's parenting time with the children of every other weekend and one day in the week she does not have weekend time with the children. The court divided the marital estate; neither party makes an issue with respect to that division. Mother timely appealed.

[1] She was made a party to this litigation by Mother.

II.

Mother raises the following issues on appeal:

> 1. Was there a sufficient basis for the findings made in the Parenting Plan?
>
> 2. Was there a sufficient basis for the trial judge's determination that the Georgia home was not marital property?
>
> 3. Does a confidential relationship exist between divorcing spouses?

III.

With regard to all issues, our review is de novo upon the record of the proceedings below. However, that record comes to us with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). There is no presumption of correctness with respect to the trial court's conclusions on matters of law, ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005), or to its application of law to the facts, ***State v. Thacker***, 164 S.W.3d 208, 247-48 (Tenn. 2005).

Trial courts are vested with broad discretion in framing parenting plans and choosing primary residential parents. ***Parker v. Parker***, 986 S.W.2d 557, 563 (Tenn. 1999). We review such determinations under an abuse of discretion standard. ***Id***. Under such a standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made." ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000); ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999).

IV.

Mother first takes issue with the provisions of the parenting plan and asserts that the trial court made no specific findings of fact in support of its plan. The gist of Mother's argument is that the trial court erred when it failed to incorporate into the plan or its final order each of the recommendations made by Dr. Hillner. In particular, Mother seeks a remand for entry of a parenting plan that provides for family therapy, the use of a parental coordinator, and a residential schedule that grants Mother, over time, with a gradual increase in parenting time. She argues that she and Father should eventually have equal parenting time.

The trial court established a permanent parenting plan that generally maintains the temporary plan which was originally implemented in November 2007. Under this plan, the children continued to reside in the marital home with Father, with him serving as the primary residential parent, with weekend co-parenting time for Mother every other week and one day during the week in which

Mother does not have weekend time with the children. Holidays, vacations, and other significant dates were equally divided between the parties and the parties were designated as joint custodians for the purpose of making major decisions regarding the children. Mother was ordered to pay child support. As pertinent to Mother's issue on the parenting plan, the trial court found the following:

> There are two minor children in the marriage, [Lauren], age 12 and Madison, age 9. The children have been living with [Father] with visitation exercised by [Mother]. Based upon the testimony produced, including the recommendation from Dr. William M. Hillner and other psychologists and counselors involved with the children, [Father] is named the primary residential parent. [Mother's] visitation is set out in the permanent parenting plan.
>
> * * *
>
> Both parties expressed a desire that the children remain in private school. The Court hold that the tuition for the private school and after school programs will be share equally by the parents.
>
> In addition to the provisions of the attached Permanent Parenting Plan, the Court orders that the children continue to receive counseling, the cost of which will be split evenly between the parents. The parents are encouraged to receive counseling in regard to their relationships with the children. Each parent is responsible for the costs of his or her own counseling.

Tenn. Code Ann. § 36-6-404 (2005) provides for the establishment of a permanent parenting plan as a part of a final divorce judgment in actions involving minor children. In establishing a residential schedule as a part of the plan, a trial court is instructed to consider the following factors as relevant in a particular case:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
>
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;

(4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;

(5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

(6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;

(7) The love, affection, and emotional ties existing between each parent and the child;

(8) The emotional needs and developmental level of the child;

(9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;

(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;

(11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

In this case, the trial court expressly relied upon the testimony at trial and the professional opinions and recommendations of Dr. Hillner and others in making Father the primary residential parent and in establishing Mother's co-parenting time. The record reflects that Dr. Hillner spent 19 hours (1) interviewing Father, Mother, and the children and (2) administering tests to Father and Mother in order to determine the best interest of the children regarding custody and co-parenting time. Dr. Hillner noted the strengths and weaknesses of each parent, but ultimately believed it was "in the best interest of the children to remain with [Father]." Further, the doctor noted that the relationship between the children and Mother "greatly concern[ed]" him. He offered various recommendations aimed at improving that relationship, including family therapy and a parental coordinator to report "whether both parents are complying with the court[']s directives."

Dr. Hillner cited four basic reasons underlying his belief that Father should serve as the primary custodian, to wit: (1) By every measure, Father was viewed as the "preferred parent" by both children; (2) Father had provided a stable home for the children; (3) Father's work schedule "allowed for greater flexibility" to care for the children; and (4) Father was seen as the "preferred parent" on the ASPECT test, a device used to combine results of other tests in the overall assessment. In recommending that the children remain primarily with Father, Dr. Hillner stated:

> If the primary residence should substantially change, Lauren and [Madison] would [be] likely to show a decline in their emotional and behavior functioning. While the relationship between the children and [Mother] could be addressed in counseling, it is likely the course of treatment would be quite challenging.

Dr. Hillner thus proposed a "traditional plan of visitations, i.e., alternate weekends for the children with [Mother] and an additional day during the opposing week;" a "long weekend (three days)" with Mother within nine months; and, after 18 months, additional time added to Mother's weekends. Dr. Hillner concluded: "Hopefully, [the children] eventually should be able to spend equal time with both parents."

Dr. Sondra Kilpatrick, a psychologist retained by Mother, reviewed Dr. Hillner's assessment. While she noted factual errors in his report and questioned his use of the ASPECT test, Dr. Kilpatrick agreed with Dr. Hillner's recommendations of further therapy, the use of a parental coordinator, and increased visitation by Mother. Additional testimony from Dr. Jan Sherbak, Lauren's therapist since 2004, also supported Dr. Hillner's recommendations. By deposition, Dr. Sherbak testified as follows:

> Q: [I]f the Court is going to separate the parties and award temporary primary residential parent to one of these parties, do you have an opinion within a reasonable degree of psychological certainty as to what would be in the best interest of these chidren, where they would reside?
>
> Mr. Durand: Objection.

> A: Yeah. The - - the attachment that [Father] has with the children and the distancing and the conflict that [Mother] has with the children suggests that the children would be better off with [Father] as primary caretaker.
>
> Q: Okay. Is that both on a temporary basis and a permanent basis, as far as your opinion?
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> Mr. Durand: Object to this and the similar questions.
>
> A: At this point, yes.

Dr. Sherbak went on to say that she was "absolutely not" recommending that Lauren not have contact with Mother. She said Lauren "needs her mom." Dr. Sherbak noted, however, that Father was a "[p]assive, but involved parent" who was the primary caregiver and had a "very close, loving relationship" with Lauren. Dr. John Oldham, Father's therapist, testified that a major focus of his time with Father was on the latter's parenting and relationship with his children. Dr. Oldham noted that he was working with Father to help reduce and manage his anger but that he did not view this as a "major issue." Asked to assess Father as a parent, Dr. Oldham described Father as a "good parent" who was "very caring and very supportive."

The trial court questioned the children in chambers regarding their preference. Both children generally indicated that they enjoyed the time they spent with Father more, but agreed they liked it when Mother took them roller-skating. Asked whether there was anything she wanted the court to know, Lauren replied, "That I want to live with my daddy."

The "welfare and best interest[] of the child[ren] are the paramount concern in custody, visitation, and residential placement determinations, and the goal of any such decision is to place the child[ren] in an environment that will best serve [their] needs." *See* ***Burden v. Burden***, 250 S.W.3d 899, 908 (Tenn. Ct. App. 2007)(quoting ***Cummings v. Cummings***, M2003-00086-COA-R3-CV, 2004 WL 2346000, at *5 (Tenn. Ct. App. M.S., filed October 15, 2004)). The trial court heard extensive testimony from both parties, expert therapists and counselors, and the children regarding the parties' differing parenting styles, their respective relationships with the children, their parenting strengths and weaknesses, the temporary custody and co-parenting times, and the children's preference regarding primary custody, co-parenting times, and other parenting matters. The proof showed that both children were good students. Lauren had experienced behavior and mood disturbances for which she had been in therapy for several years preceding the divorce. Both children had a closer relationship with Father, while Lauren, in particular, experienced conflicts and tension with Mother and expressed a clear desire to live with Father. Both parents expressed love, and a desire to care for the children.

In short, although the trial court did not make extensive specific findings of fact, the evidence does not preponderate against the trial court's decision that the children would be best served by a residential schedule that allowed the children to spend the majority of their time with Father in the home in which they were raised, with Father continuing as their primary caregiver. At the same

time, Mother was granted ample co-parenting time to develop and improve her relationship with the children, bolstered by further counseling. As the Supreme Court has stated:

> It is not the function of appellate courts to tweak a visitation order in the hopes of achieving a more reasonable result than the trial court. Appellate courts correct errors. When no error in the trial court's ruling is evident from the record, the trial court's ruling must stand.

Eldridge v. Eldridge, 42 S.W.3d 82, 88 (Tenn. 2001). We find no error in the trial court's judgment with respect to the permanent parenting plan.

V.

Next, Mother contends that the trial court erred in finding that the Georgia property was not marital property subject to distribution in this case. Resolution of this issue is necessarily fact-driven. For this reason, we have carefully reviewed the trial testimony and other evidence related to the acquisition of the Georgia property by Father.

Father testified that his mother, Mary Covill, was interested in buying real estate as an investment. Through some flyers he received in the mail, Father was aware of a December 2003 auction to be conducted by Potts Brothers Auctions in Georgia. Father testified that he attended the auction for his mother because, for religious reasons, she would not attend because the auction was on a Saturday. At the auction, Father bought six lots for $71,000. Father did not have his mother's power of attorney to purchase the property. The sales contract lists Father as the purchaser, but indicates that the property would be titled in the name of "Mary Covill." Father was aware that his mother kept cash in a safe deposit box at her home. According to Father, in July 2003, his mother gave him $22,000 cash in $100 bills to take to the auction. Father said that at the auction, he paid the $17,000 deposit on the property from his FSG checking account. In January 2004, he received the balance of $53,000 from his mother, again in cash, and in turn obtained a cashier's check from his checking account funds to pay for the property. Father said that he deposited the cash he received from his mother in his FSG checking account, but, on reviewing his bank statements for the period of late 2003 to mid-January 2004, he could not point to cash deposits totaling the purchase price. In February 2005, Father entered into a contract with his parents for Covill Construction to build a house on one of the lots for $75,000. Father's mother paid him $75,000 in three payments, the last one being in June 2007.

Mary Covill, age 67, testified that she retired from McDonald's in 2003. She had worked for the past 13 years at the McDonald's drive-thru window, earning take home pay of $150 a week. Her husband, Lloyd, was an engineer who retired in 2003. He had earned $4,400 a month. Mary[2] said that she had $84,000 in cash savings when she gave Father first $22,000, and later $53,000 in cash to go to the property auction for her. She said that she and her husband had accumulated the

[2]For ease of reference, we use her first name – and not her last name – lest references to her be confused for references to Mother.

money over a 28-year period through 2002. She had no records pertaining to her accumulation of cash. She said Father had her verbal permission to buy property for her; she acknowledged that she did not sign the contract and did not attend the closing. Mary and her husband had refinanced their own home through their credit union to build the house in Georgia. She said they did not list the Georgia property or another piece of real estate in New Hampshire as assets on the credit union loan application because she believed them to be irrelevant. Mary said she was making the $1,100 monthly mortgage payment on the Georgia house from her remaining savings and the proceeds of some life insurance policies she and her husband had cashed in between 2002 and 2007. Mary said the warranty deed was in her name.[3]

Mary testified that when she was working, she normally cashed her check and put all of the cash in a lock box at home. She said that, over the years, she and her husband had lived a frugal life, never took extravagant vacations, did not eat out and spent less than they made. She said she paid all of their bills online or through electronic checking. She said she and her husband received social security and had begun to roll over certain IRAs and annuities. Mary denied that Father had asked her to hold the Georgia property for him during the pendency of the divorce. She said she had planned to build a house on the Georgia property and then sell off lots, but the property had not yet been subdivided. Mary said that she met Lynn Miller, the children's babysitter, in 2004, when Miller came to her home at Thanksgiving at the children's invitation. She said that Miller moved into the Georgia home when it was completed in July 2007. Miller had no written lease and paid only utilities.

On this record, Mother contends that Father's story about purchasing the Georgia property for his mother is just that – a "story." She contends that Father purchased the property with his own money and successfully hid this fact until she learned about it during the divorce proceedings. The trial court made extensive findings of fact regarding the Georgia property:

> One issue is whether certain property and a residence located in Georgia is part of the marital estate or the property of . . . [Father's] mother. Testimony at trial was that his mother had gave over $50,000 in cash to purchase real property in Georgia as an investment for her. [Father's] mother testified at trial that [it] was, and always has been, her habit to save large sums of cash and to use cash to pay her expenses. Although [Father's] mother's financial dealings and habits may seem strange to the Court, there is no evidence to refute her testimony in this regard. The bank records of [Father's] FSG account show deposits that equal the amount of cash his mother testified she gave [Father]. The real estate in Georgia was titled to [Father's] mother and the house subsequently erected on that property was financed by a mortgage taken out by her. The evidence leads to no other conclusion but that the property and home in Georgia is the property of [Father's] mother.

[3]The warranty deed does not appear in the record.

> All parties testified that [Father], the children and Ms. Miller, the children's "babysitter" spend considerable time at that residence. In fact, Ms. Miller lives there full time. There is evidence that the relationship between [Father] and Ms. Miller is something other than business and it would not be surprising if [Father] subsequently ends up in the home in Georgia. However, at the time of the divorce, the home was clearly property of [Father's] mother and thus does not figure into the marital estate.
>
> However, [Father's] mother did pay Covill Construction Company $75,000.00 to build the home on that property. There is no evidence of how much profit [Father] made in the construction of the home. Therefore, the Court will assign a profit of 10% or $7,500.00 which should have gone into Covill Construction Company, which is as stated previously, a marital asset.

Pursuant to Tenn. Code Ann. § 36-4-121(a) (2005), the trial court is charged with dividing the parties' marital property in a just and equitable manner. It follows that the "proper classification of a couple's property is essential." ***Batson v. Batson***, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). "Property cannot be included in the marital estate unless it fits within the statutory definition of 'marital property. . . .' " ***Nesbitt v. Nesbitt***, M2006-02645-COA-R3-CV, 2009 WL 112538 at *6 (Tenn. Ct. App. Jan. 14, 2009). "Marital property" is defined to include:

> [A]ll real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date.

Tenn. Code Ann. § 36-4-121(b)(1)(A). "Property no longer owned when the complaint is filed does not constitute marital property within the meaning of the statute except in the case of a fraudulent conveyance in anticipation of a complaint for divorce being filed." ***Denton v. Denton***, 902 S.W.2d 930, 932 (Tenn. Ct. App. 1995).

Mother strenuously argues that the Georgia property must be considered marital property because, according to her, there is a lack of proof as to the source of the nearly $75,000 that Father used to buy the undeveloped lots at auction. Mother correctly notes that the cash payments to which Father and Mary testified cannot be independently verified because there were no written records to support the amount of Mary's savings. Even more problematic is the fact that Father cannot substantiate his testimony that he deposited the cash Mary gave him before paying for the purchase with a check and cashier's check out of the same account. A review of Father's FSG checking account, consistent with the accountant's review, reflects cash deposits totaling no more than

$25,000 in the relevant time period. In this regard, the trial court's finding that "[Father's] FSG account show[s] deposits that equal the amount of cash his mother testified she gave [Father]" is simply not supported by the evidence presented. This factual error by the trial court, however, does not necessarily mandate a conclusion that the trial court erred in finding and holding that the Georgia property is not a marital asset.

Briefly summarized, there is evidence showing the following: Father purchased the property in December 2003 and paid for it in full the following month; the sales contract reflects that the land was to be titled in the name of Mary Covill; in February 2005, Mary entered into a contract with Father's company to construct a house on the property and subsequently paid the cost of construction in full; and, in May 2005, Mary Covill, as "owner" of the property, was issued a building permit for the property in Walker County, Georgia. The divorce complaint was filed in December 2006. When this evidence is considered in conjunction with the trial court's pre-eminent role on the issue of credibility, we conclude that the evidence does not preponderate against the trial court's finding that the Georgia property that Father purchased at auction belonged, at the time of the divorce, to Mary Covill. Stated differently, while we are inclined to agree with Mother's contention that the source of the funds from which Father purchased the property remains in question, no evidence contradicts the conclusion that the property was under Mary Covill's ownership and control well before Father initiated these divorce proceedings. The evidence does not preponderate against the trial court's finding that the Georgia property is not marital property.

VI.

In a related issue, Mother contends that a confidential relationship existed between her and Father, and that this relationship created a duty between the parties not to hide marital assets. Mother is alluding to the Georgia property which, as previously noted, the trial court found to be the property of Father's mother. Since we have held that the evidence does not preponderate against that finding, there is no need to extensively address Mother's contention. Suffice it to say that we have responded to a similar argument in the case of ***Southers v. Southers***, 03A01-9802-CV-00001, 1999 WL 333315 (Tenn. Ct. App. E.S., filed May 27, 1999) as follows:

> We know of no Tennessee appellate case authority deciding whether, and to what extent, a confidential relationship giving rise to a duty to disclose -- as distinguished from a duty not to engage in an affirmative misrepresentation or a duty not to hide marital assets -- exists as between divorcing parties.

Id. at *4.

VII.

The judgment of the trial court is affirmed. This case is remanded to the trial court, pursuant to applicable law, for enforcement of its judgment and for collection of costs assessed below. Costs on appeal are assessed against the appellant, Taylor Renee Covill.

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CHARLES D. SUSANO, JR., JUDGE